

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE J. OSORIO,

Defendant and Appellant.

B207124

(Los Angeles County
Super. Ct. No. KA079173)

APPEAL from a judgment of the Superior Court of Los Angeles County. Charles E. Horan, Judge. Affirmed.

Mark D. Lenenberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Steven D. Matthews, Supervising Deputy Attorney General, Blythe J. Leszkay, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

A jury convicted defendant and appellant Jose J. Osorio (defendant) of two counts of lewd acts upon a child (Pen. Code, § 288, subd. (a))¹ (counts 1 and 2) and two counts of child molestation (§ 647.6, subd. (a)) (counts 3 and 4). Defendant's sole argument on appeal is that the sex offender fine imposed by the trial court pursuant to section 290.3 should have been \$200 rather than \$300. Because the offense of which defendant was convicted on count 4 occurred subsequent to the effective date of legislation raising the amount of the sex offender fine to \$300, the amount of the fine was proper. We therefore affirm.

BACKGROUND

With respect to Counts 1 and 2, defendant was charged with and convicted of lewd acts upon a child that took place in 2005. With respect to Count 3, he was charged with and convicted of molesting a child in 2006. With respect to Count 4, he was charged with and convicted of molesting a child in 2007. Because of the issue in this case, we do not set forth the details of the crimes.

Defendant was charged in a four-count information with two felony counts of committing a lewd act upon a child (§ 288, subd. (a)) in 2005, and two misdemeanor counts of child molestation (§ 647.6, subd. (a))—one in 2006 and the other in 2007. Defendant was convicted by a jury on all four counts. The trial court sentenced defendant to the mid term of six years in state prison on count 1. The trial court also sentenced defendant to the mid term of six years on count 2 and 90 days each on counts 3 and 4, all to run concurrently with defendant's sentence on count 1. Defendant received 147 days of presentence credit, consisting of 128 days of actual custody and 19 days of conduct credit. The trial court found that defendant already had served the time necessary on counts 3 and 4. The trial court also imposed a \$300 sex offender fine

¹

All statutory references are to the Penal Code unless stated otherwise.

(§ 290.3); a \$200 restitution fine (§ 1202.4, subd. (b)); a \$200 parole revocation restitution fine, stayed (§ 1202.45); two \$20 court security fees, for a total of \$40 (§ 1465.8, subd. (a)(1)); and a penalty assessment and surcharge.

DISCUSSION

Defendant argues that the trial court erred by imposing a \$300 sex offender fine pursuant to section 290.3, subdivision (a). Defendant contends that, when defendant committed his crimes, section 290.3, subdivision (a) provided for only a \$200 fine.² Defendant is mistaken.

At the time defendant was sentenced, section 290.3, subdivision (a) provided in relevant part: “Every person who is convicted of any offense specified in subdivision (c) of Section 290 shall, in addition to any imprisonment or fine, or both, imposed for commission of the underlying offense, be punished by a fine of three hundred dollars (\$300) upon the first conviction or a fine of five hundred dollars (\$500) upon the second and each subsequent conviction, unless the court determines that the defendant does not have the ability to pay the fine.” (§ 290.3, subd. (a).)³ The qualifying offenses specified in section 290, subdivision (c) include both lewd acts upon a child in violation of section 288 and child molestation in violation of section 647.6.⁴

² Although defendant did not object to the sex offender fine on this basis in the trial court, the imposition of a sex offender fine in an amount other than that prescribed by statute constitutes an unauthorized sentence correctable on appeal. (*People v. Walz* (2008) 160 Cal.App.4th 1364, 1370.)

³ Subdivision (a) was not affected by the amendments to section 290.3 effective January 1, 2009. (Stats. 2008, ch. 699 (S.B. 1241).)

⁴ Section 290, subdivision (c) provides in relevant part, “The following persons shall be required to register: [¶] Any person who, since July 1, 1944, has been or is hereafter convicted in any court in this state . . . of a violation of . . . Section 266j, 267, 269, 285, 286, 288, 288a, 288.3, 288.4, 288.5, 288.7, 289, or 311.1, subdivision (b), (c), or (d) of Section 311.2, Section 311.3, 311.4, 311.10, 311.11, or 647.6, . . . or any person

Before September 20, 2006, section 290.3, subdivision (a) provided for a \$200 sex offender fine upon a defendant's first qualifying conviction. (Former section 290.3, subd. (a); see *People v. Walz, supra*, 160 Cal.App.4th at p. 1368, fn. 6; Historical and Statutory Notes, 48 West's Ann. Pen. Code (2008 supp.) foll. § 290.3, pp. 275-276.) Effective September 20, 2006, section 290.3, subdivision (a) was amended to raise the amount of the fine for the first qualifying conviction to \$300. (Stats. 2006, ch. 337, § 18; see *People v. Walz, supra*, 160 Cal.App.4th at p. 1368, fn. 6.)

Pursuant to sections 290.3, subdivision (a) and 290, subdivision (c), the trial court could have (and, absent a finding that defendant was unable to pay, *should* have) imposed a separate and additional sex offender fine with respect to *each* of defendant's four qualifying convictions. (*People v. Walz, supra*, 160 Cal.App.4th at p. 1371 ["each qualifying conviction in a single proceeding constitutes a separate conviction for purposes of imposing sex offender fines"]; *People v. O'Neal* (2004) 122 Cal.App.4th 817, 822 [same].)⁵ The information alleged that the crime of child molestation charged in count 4 occurred on or about April 20, 2007. There was evidence introduced at trial to support that allegation, and defendant was convicted of that crime. Defendant thus committed the crime charged in count 4 *after* the amendment to section 290.3 raising the sex offender fine to \$300 went into effect on September 20, 2006. Defendant therefore was subject to a \$300 sex offender crime for that conviction.

The trial court did not specify which of defendant's qualifying convictions was the basis for imposing the sex offender fine. On appeal, all intendments are indulged to support the judgment of the trial court as to matters on which the record is silent, and

who since that date has been or is hereafter convicted of the attempt or conspiracy to commit any of the above-mentioned offenses."

⁵ The People did not object at the sentencing hearing to, and did not appeal, the trial court's failure to impose sex offender fines on three of defendant's four qualifying convictions. The People forfeited the issue. (*People v. Walz, supra*, 160 Cal.App.4th at p. 1371.)

.

error must affirmatively be shown. (*People v. Giordano* (2007) 42 Cal.4th 644, 666.) Accordingly, we presume that the trial court imposed the \$300 sex offender fine with respect to count 4. The \$300 sex offender fine was proper.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MOSK, J.

We concur:

TURNER, P. J.

KRIEGLER, J.